93-452

Supreme Court, U.S.
FILED
SEP 17 1993
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S APPENDIX

DONALD V. JERNBERG
JOHN Y.E. LEE
OPPENHEIMER, WOLFF & DONNELLY
Two Prudential Plaza
45th Floor
180 N. Stetson Avenue
Chicago, IL 60601
(312) 616-1800

ALLEN J. FLATEN
Counsel of Record
P. ROBERT VAALER
VAALER, WARCUP, WOUTAT, ZIMNEY & FOSTER (CHARTERED)
5th Floor - Metro. Bldg.
600 Demers Avenue
P.O. Box 1617
Grand Forks, ND 58206-1617
(701) 772-8111

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	App. Page
OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS SOUGHT TO BE REVIEWED	1
OPINION AND ORDER OF THE HONORABLE SUZANNE B. CONLON, UNITED STATES DISTRICT JUDGE, GRANTING SUMMARY JUDGMENT IN FAVOR OF SIOUX MANUFACTURING	22
OPINION AND ORDER OF THE HONORABLE SUZANNE B. CONLON, UNITED STATES DISTRICT JUDGE, DENYING PLAINTIFFS' MOTIONS TO VACATE	37
ORDER OF SEVENTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC	43
JUDGMENT OF THE SEVENTH CIRCUIT COURT OF APPEALS SOUGHT TO BE REVIEWED	44
25 U.S.C. SECTION 81	45
28 U.S.C. SECTION 1332	47
DEVILS LAKE SIOUX TRIBAL LAW AND ORDER CODE PROVISIONS	49
SEC. 2-2-103	49
SEC. 2-2-104	50
SEC. 10-4-104	50
SEC. 10-4-106	51
SECTION 4 OF THE ARTICLES OF INCORPORATION OF SIOUX MANUFACTURING CORPORATION	53
LETTER OF INTENT	56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONER'S APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1633

ALTHEIMER & GRAY, a partnership,

Plaintiff-Appellant,

v.

SIOUX MANUFACTURING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 3496—**Suzanne B. Conlon**, *Judge.*

ARGUED OCTOBER 22, 1992—DECIDED JANUARY 8, 1993
AS AMENDED JANUARY 22, 1993

Before POSNER and COFFEY, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

WOOD, JR., *Senior Circuit Judge.* This case deals with the modern application of a 19th century federal statute designed to protect Indian tribes in land transactions. For reasons explained below, we reverse the district court's grant of summary judgment and remand the case for further proceedings.

I. BACKGROUND

In 1872, Congress passed what is now known as 25 U.S.C. § 81. The statute requires contracts concerning Indian lands to be approved by the Secretary of the Interior. Contracts

without the Secretary's approval are of no effect. According to the Supreme Court, the statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227 (1893); *see also Cong. Globe* 1483 (1871) (law is for Indians' "protection and to prevent them from being plundered"). At the time of the law's enactment, Indians apparently were being swindled by dishonest lawyers and claims agents. *See United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co.*, 616 F. Supp. 1200, 1217 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

As this court noted in 1985, Congress has neither implicitly nor explicitly overruled section 81 and the statute continues to "govern[ ] transactions relative to Indian land for which Congress has not passed a specific statute." *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985). The statute, in fact, has seen new life in recent years as Indian reservations have contracted with outside firms to build and operate bingo halls and casinos on their reservations. *See id.*

The case before us also features 25 U.S.C. § 81 and an Indian tribe attempting to generate revenue for its people. Here, though, the tribe chose to reduce its forty-five percent unemployment rate through manufacturing rather than through gambling. To do so, the Devils Lake Sioux Tribe ("Tribe"), a federally recognized Indian tribe, created the Sioux Manufacturing Corporation ("SMC") to manufacture and market camouflage cloth and military helmets. SMC is a wholly-owned tribal corporation and governmental subdivision of the Sioux, organized under the Tribe's Law and Order Code. The corporation's offices and sole manufacturing facility are located inside the boundaries of the Devils Lake Sioux Reservation ("Reservation") in Fort Totten, North Dakota, on land which SMC leases from the Tribe. The Reservation itself was established by treaty on February 19, 1867.

Seeking to expand their business, the Tribe and SMC negotiated with Medical Supplies & Technology, Inc. ("MST"),

an Illinois corporation, to manufacture and market latex medical products at the Reservation plant. In the course of these negotiations, MST submitted a "Letter of Intent" to "the Fort Totten Tribe of the Sioux Nation and Sioux Manufacturing Corporation ('Sioux'), to set forth its understanding of the terms of certain proposed transactions by and among MST . . . and an entity wholly-owned, directly or indirectly, by the Sioux." On March 7, 1990, John Veleris, MST's president, and Robert Manning, vice-president and general manager of SMC, signed the nine-page Letter of Intent ("Letter").

According to the Letter, MST, the Tribe, and SMC would engage in a business to produce and market various latex medical products in facilities located on the Reservation. The parties intended that MST would "provide its technology, know-how and expertise in relation to the production and marketing of the Products" whereas SMC would obtain all required governmental approvals, including "any approvals required by the Bureau of Indian Affairs." SMC was also to provide "all working capital, investment capital, facilities and labor needed for the production of the Products and the operation of the Business."

The details of these transactions were to "be discussed further by Seller and Buyer and agreed to in good faith and shall be set forth in various contracts and other agreements." One of the agreements was to be an "Asset Purchase Agreement," whereby SMC would purchase all of MST's assets. These assets included contracts for machines that produce the latex products, architectural drawings for the facility, and waste and environmental plans for the Reservation land. Another future agreement was to be a "Consulting Agreement," whereby MST would provide consulting services to SMC for the management and operation of the latex products business. This would entail MST supplying technical and engineering assistance, marketing the products, and training those individuals that SMC picked for the management and operation of the business.

The Letter also outlined various payments from SMC ("Buyer") to MST ("Seller") for its consulting services and

provided that MST would take up to thirty percent of the latex business's "net profits." The net profit was to be calculated as the difference between gross sales of the latex medical products and:

> (a) cost of materials; (b) wages (in an amount mutually agreeable to Buyer and Seller); (c) utilities and maintenance; (d) salaries and administration (in an amount mutually agreeable to Buyer and Seller); (e) costs paid to Veleris for consulting under the Consulting Agreement; (f) rent; (g) taxes (it being understood, however, that the amount of taxes imposed by tribal authorities to be deducted from Net Profits will not exceed 1% of gross sales); (h) other operational costs (to be agreed to by Buyer and Seller); (i) $83,334 per year; and (j) the Applicable Percentage of depreciation of equipment calculated on a straight line basis over 30 years.

As can be seen above, under the contemplated agreements neither SMC nor MST would be able to unilaterally set salaries or wages or administration costs or other operational costs.

Anticipating future lawsuits, the Letter contained a section entitled "Sovereign Immunity." This section provided that "Buyer and the Fort Totten Tribe of the Sioux Nation (the 'Tribe') will waive all sovereign immunity in regards to all contractual disputes." The section also said that "This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois" and that all parties "agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois."

The closing of "the transactions contemplated" by the Letter was to be within sixty days of "acceptance of this Letter of Intent." In the interim, the parties were to fulfill various conditions relating to such topics as financing and distribution. Although neither party was required, by terms of the Letter, to enter into any future agreement until those conditions had been met, "all parties are here-

by bound in good faith to attempt to fulfill all such conditions."

At the end of the Letter comes section 13, upon which this lawsuit is based. Under the title of "Expenses," section 13 outlined a scheme whereby each party would pay its own expenses if "the transactions contemplated herein are consummated." If, however, the transactions were not consummated within the sixty-day period "or if the Sioux at any time notifies any other party that they are terminating negotiations" then "the Sioux shall promptly pay, upon demand, all reasonable legal and accounting fees and expenses" incurred by MST in connection with the negotiation of the deal. The Tribe and SMC were relieved from payment, however, if "actions taken in bad faith by Seller" prevented the consummation. In such a case, MST would pay "all reasonable fees and expenses incurred by Buyer."

After the Letter of Intent was signed on March 7, 1990, MST began business operations within the SMC manufacturing facilities. The closing, however, did not occur within the sixty-day period and the parties executed two subsequent agreements to extend the date of closing until November 1, 1990. Despite the extensions, none of the contemplated contracts were ever executed, the deal was never consummated, and MST ceased operations within the Reservation.

II. PROCEDURE

In Spring 1991, SMC was hit with a double-barreled attack. On May 10, 1991, MST sued SMC in Illinois state court for breach of contract. MST contended that SMC failed to act in good faith to satisfy the contractual conditions precedent to closing. On June 5, 1991, MST's law firm, Altheimer & Gray, filed suit against SMC in federal district court. Altheimer is a partnership organized under Illinois law with its principal place of business in Chicago, Illinois; it has 82 partners, all of whom are citizens of Illinois or Indiana. The firm had provided MST with legal services in connection with the negotiations with SMC and

in its suit contended it was an intended third-party beneficiary of section 13 of the Letter of Intent agreement. Altheimer sought payment of $167,593.77 in damages plus interest and costs.

On June 12, 1991, SMC removed MST's action to district court, and on SMC's motion the district court consolidated the two cases. The district court based its subject matter jurisdiction on the diverse citizenship of the parties, pursuant to 28 U.S.C. § 1332. On August 20, 1991, SMC filed a motion to dismiss or, in the alternative, for summary judgment. On November 15, 1991, the district court granted summary judgment to SMC on the ground that the contract was null and void under 25 U.S.C. § 81. On November 29, 1991, Altheimer filed a motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 59(e). On February 14, 1992, the district court entered an order denying that motion. MST did not appeal; Altheimer did, filing its initial Notice of Appeal on March 12, 1992. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

In reviewing a district court's grant of summary judgment, we review de novo the record and the controlling law. *Appley v. West*, 929 F.2d 1176, 1179 (7th Cir. 1991). We will uphold the entry of summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

IV. ANALYSIS

On appeal, the Plaintiff presents these four arguments: 1) the Letter of Intent is not relative to Indian lands, and therefore does not fall within 25 U.S.C. § 81; 2) SMC's obligations under the Letter do not adversely affect any tribal land interest; 3) any ambiguity in the agreement's obligations relative to Indian lands establishes a genuine issue of material fact which precludes summary judgment;

and 4) the obligations of the Letter are severable from the contemplated contracts.

The Defendant responds with these three arguments: 1) the Letter of Intent is relative to Indian lands, and as it does not comply with 25 U.S.C. § 81 the agreement is null and void; 2) as a sovereign, the Sioux are immune from suit; and 3) Altheimer failed to exhaust tribal court remedies and therefore federal court consideration of the case is premature.

As can be seen, the principal dispute between the parties concerns the application of 25 U.S.C. § 81 to the Letter of Intent. It is there that we will begin our analysis.

A. RELATIVE TO INDIAN LANDS

In pertinent part, section 81 reads:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> . . .
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . .
>
> All contracts or agreements made in violation of this section shall be null and void . . . .

25 U.S.C. § 81.

The language of the statute mandates a three-part inquiry into the identity of the contracting parties, the nature of the contract, and whether the contract was approved by the Secretary of Interior. The last inquiry is the easiest to dispose of, as both parties admit the contract formed

by the Letter of Intent was never approved by the Secretary. Our inquiry, therefore, focuses on these two issues: 1) was the disputed contract "with any tribe of Indians," and 2) is the contract "for the payment or delivery of any money or other thing of value . . . or for the granting or procuring any privilege . . . in consideration of services for said Indians relative to their lands"?

1. The Contracting Parties

Although the Letter of Intent was signed by the president of Medical Supplies & Technologies, Inc. and the vice-president of Sioux Manufacturing Corporation, the court below considered the contract to be between the Sioux Tribe and MST. The court did not lightly ignore SMC's corporate status, but recognized that both plaintiff and defendant seemingly considered the Tribe and SMC to be interchangeable.

MST, advised by Altheimer, addressed the Letter of Intent to the "Fort Totten Tribe, Sioux Nation." MST also referred to both the Tribe and SMC collectively as the "Sioux," and listed the "Sioux" as participants in several of the contemplated transactions. Section 13, for instance, states that "if the Sioux at any time notifies any other party that they are terminating negotiations . . . the Sioux shall promptly pay, upon demand, all reasonable legal and accounting fees." MST, moreover, seemed to regard the signature of Sioux Manufacturing as binding upon the Tribe itself regarding the waiver of sovereign immunity, choice of law, and forum selection clauses.

Nor does the Defendant in this case consistently distinguish the two entities. In its brief, SMC argues the corporation should be treated as the Tribe and notes the following facts: SMC is located on twenty-seven acres of land held in trust for the Tribe by the United States; under its articles of incorporation, SMC is chartered as "a tribal corporation and government subdivision" of the Tribe; as a governmental subdivision, SMC enjoys federal and tribal law with all privileges and immunities of the Tribe; SMC's

board of directors must include the six sitting members of the Sioux Tribal Council.

Given this alleged unity between SMC and the Tribe, Defendant contends section 81 should apply to the corporation. To support its position, SMC cites *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987). In that case, the Pueblo created the Santa Ana Enterprise ("Enterprise") to generate revenue for the tribe. The Enterprise was a nonprofit instrumentality of the Pueblo of Santa Ana; it was empowered to make contracts, to sue and be sued, but it had no power to bind or obligate the funds of the Pueblo. The Enterprise was not a corporation, did not hold itself out as a corporate entity, and had no shareholders. The tribe leased 100 acres of tribal trust land to the Enterprise and gave it full power to develop and manage the property. The Enterprise in turn contracted with a non-Indian businessman to construct, manage, and maintain a greyhound racetrack on the tribal land. By terms of the contract, neither the Enterprise nor the businessman could encumber the property without the consent of the other. *Id.* at 1302-03.

After the Secretary of Interior refused to approve the facility, banks supporting the racetrack withdrew their funding. This prompted the Pueblo to sue the Secretary. In their suit, the tribe argued that the Secretary's approval was not required since section 81 applies only to agreements between non-Indians and Indian tribes, and the contract was with Santa Ana Enterprise and not the tribe. The district court rejected this argument. According to the court, allowing the Pueblo to evade section 81 through the formation of the Enterprise would undercut Congressional intent: "Congress could not have mandated that the Secretary review all leases and contracts between Indian and non-Indian only to permit the tribes to avoid review when they deem provident." *Id.* at 1306.

The court below accepted the analogy to *Pueblo of Santa Ana*. Altheimer, however, argues that SMC's status as a business corporation is "more than a mere formality" and

contends the contract is with the corporation and not the Tribe. To support this contention, Altheimer cites *Inecon Agricorp. v. Tribal Farms, Inc.*, 656 F.2d 498 (9th Cir. 1981). In that case, the Fort Mojave Indian Tribe created Tribal Farms, an Arizona corporation. The corporation contracted with Inecon, a non-Indian corporation, for agricultural land development and management. After a dispute between the two parties, an arbitrator ruled in Inecon's favor and awarded substantial damages. In a three-page opinion that contained little elaboration or analysis of the disputed contracts, the Ninth Circuit said the contracts were not covered by 25 U.S.C. § 81.

Crucial to the Ninth Circuit's decision was that the contract was with a corporation, rather than the tribe itself: "Tribal Farms is an Arizona corporation and thus does not fall within the protected class of 'tribe of Indians or individual Indians' covered by the statute.' 656 F.2d at 501. Altheimer points out that SMC, unlike the Enterprise in *Pueblo of Santa Ana*, is a corporation with funds and property that are separate and distinct from the Tribe. This, it argues, places the present dispute closer to *Inecon*. We disagree.

Plaintiff ignores the facts of *Inecon*. In *Inecon*, the Ninth Circuit described the Indian tribe has having a "limited role" in the contract. *Inecon*, 656 F.2d at 498. According to the Ninth Circuit, the Fort Mojave Indian Tribe's "sole interest in the contract is its pledge 'not to interfere, hinder, or otherwise obstruct Inecon, its officers, agents or employees in its performance of its contract duties or receipt of its contract rights.' " *Id.* at 501. The Sioux cannot be said to have played such a limited role in the present contract.

We wish to make clear that we do not regard SMC as a "mere formality," but we also do not regard our task as authoritatively delineating the powers of tribal corporations. Nor do we rule on whether a contract with an Indian corporation differs significantly from a contract with an Indian tribe. Instead, we simply agree with the court

below that in analyzing the applicability of section 81 the contract should be viewed as being between an Indian tribe and MST. That being the case, the next step is to analyze the contract to see if it relates to Indian lands.

2. Relation to Indian Land

The next question in our inquiry is whether the contract is "for the payment or delivery of any money or other thing of value . . . or for the granting or procuring any privilege . . . in consideration of services for said Indians relative to their lands"? The district court assumed the Letter of Intent was a valid contract and concluded that the agreement was relative to Indian lands.

Perhaps the determinative factor in the court's decision was the Letter of Intent's first page, which stated that "Seller and Buyer will produce and market various latex medical products . . . in facilities located on the Sioux Reservation located in Fort Totten, North Dakota." The court rejected Altheimer's contention that since SMC leased the land from the Tribe, the contract was outside section 81: "Regardless how one characterizes its present use, the land remains tribal land." *Altheimer & Gray v. Sioux Mfg. Corp.*, Nos. 91 C 3496 & 91 C 3653, 1991 U.S. Dist. LEXIS 16,799, at **16 (N.D. Ill. Nov. 14, 1991), *amended*, 1992 U.S. Dist. LEXIS 1680 (N.D. Ill. Feb. 13, 1992).

This conclusion was further reinforced by the court's determination that the Tribe and SMC were virtually indistinguishable. "The letter of intent," wrote the court, "relates to a business venture between an Indian and a non-Indian organization to be located on tribal land and thus required the approval of the Secretary of Interior." *Id.* at **22. As there was no approval, the court held the letter to be null and void and granted summary judgment to SMC.

We are responsible, in part, for the district court's decision. Looking for guidance on 25 U.S.C. § 81, the court turned to the leading Seventh Circuit opinion on this stat-

ute, *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985). The district court interpreted *Koberstein* as standing for the proposition that the phrase "relative to Indian lands" must be "liberally interpreted to effectuate its purpose of protecting Indian interests," and that this court interprets section 81 as covering "nearly all transactions relating to Indian lands." *Altheimer*, 1991 U.S. Dist. LEXIS 16,799, at **14.

The district court's interpretation of *Koberstein* is not incorrect. As that case held, once a contract is found to relate to Indian lands, section 81 continues to operate. The district court, however, was too liberal in its interpretation of when a contract actually does relate to Indian lands.

In *Koberstein* this court was faced with the validity of a bingo management agreement between the Wisconsin Winnebago Tribe and the non-Indian Ho-Chunk Management Corporation. Under the agreement, Ho-Chunk would construct a bingo hall on tribal trust land. Thereafter, Ho-Chunk had the exclusive right to operate and maintain the hall. The tribe, on the other hand, was forbidden by the contract from encumbering the property without Ho-Chunk's consent. The tribe also could not modify, cancel, or assign the contract. In return for Ho-Chunk's services, it was to receive twenty-five percent of net operating profits. *Koberstein*, 762 F.2d at 614-15.

This court held that such an agreement was relative to Indian lands and therefore subject to section 81's requirements. Crucial to the court's holding were the facts that: 1) the non-Indian party had an absolute right to control the business's operation; 2) the business was located on tribal trust lands; and 3) the contract prohibited the exercise of the tribe's right to encumber tribal trust property. *Id.* at 619.

Koberstein is not alone in considering these facts important. In *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986), the Ninth Circuit also found a bingo hall management agreement to

be related to the Indian land because it gave a "non-Indian contracting party . . . the exclusive right to build and control the operation of the bingo facility located on tribal trust lands and prohibits the Band from encumbering the land." *Id.* at 787.

A year after *A.K. Management*, the Ninth Circuit found a contract relative to Indian land even though the contract did not contain a clause forbidding the Indians to encumber their land. In *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988), the court held that the contract was nonetheless relative to tribal land in that the non-Indian party had the exclusive right to construct and operate the bingo facility on Indian land. *Id.* at 1404. The Ninth Circuit reasoned that neither *A.K. Management* nor *Koberstein* required both exclusive control and an encumbrance clause as the "*sine qua non*" to finding a contract relative to Indian lands. *Id.*

In *United States Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986), the court also went beyond these two factors in finding a contract relative to Indian land. In considering a contract for the construction of a bingo facility, the court noted that unless the bingo hall was located on tribal land, the hall could not legally operate: "The very existence of the bingo operations arises from the Indian tribe's sovereignty over tribal trust lands which makes state gaming laws inapplicable to games on reservations. . . . But for its land, state law would not permit it." 616 F. Supp. at 1218. This persuaded the court that the management agreement was "inextricably tied up in the property rights" and fell under section 81's requirements. *Id.*

Reviewing the relevant cases, it is clear that the following factors are important in determining whether a management contract is relative to Indian lands: 1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-Indian party

have the exclusive right to operate that facility? 3) Are the Indians forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign? To quote the Ninth Circuit, none of the above factors are the "*sine qua non*" of a contract which relates to Indian lands. A review of the questions above, however, will show why we believe this contract is not related to Indian lands.

First, the Letter of Intent admittedly envisioned that the latex glove manufacturing operation would be located on the Sioux Reservation. Unlike the bingo hall cases, however, the facility was already in existence, was part of the Tribe's ongoing business, and was wholly owned by the Tribe. Second, neither the Letter nor the contracts contemplated by the Letter would give MST exclusive control over SMC's production of latex medical products. As earlier outlined, MST would be heavily involved in the venture. MST would sell manufacturing contracts and technical plans to SMC, MST would consult on every facet of the business's operation, including the production and marketing, and MST would receive a substantial share of the business's profits. MST, however, did not have unilateral power to set wages and salaries or operation and administration costs. While it may be an understatement to characterize MST solely as a consultant, it would be an overstatement to say MST had exclusive control over the SMC facility.

Third, neither party disputes that there was no provision forbidding the Indians from encumbering their land, either under the Letter of Intent or the contemplated contracts. Finally, the business derived no special benefit from its location on Reservation land. Unlike bingo, manufacturers of latex medical products need not seek refuge from state civil laws by locating on a reservation. As Plaintiff notes, SMC was not obligated to perform on Indian lands. In short, the Tribe did not cede any right, interest or control of Indian lands to MST.

These factors, among others, lead us to hold that neither the Letter of Intent nor the contemplated contract relate

to Indian lands, and therefore the agreement is not subject to section 81. Given our position, it is unnecessary to address the additional arguments that Plaintiff advances. We thus are left to consider Defendant's arguments concerning sovereign immunity and tribal exhaustion.

B. SOVEREIGN IMMUNITY

Indian tribes are considered "domestic dependent nations" which "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 909 (1991). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Id.*; *accord Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

As a wholly-owned governmental subdivision of the Tribe, SMC contends it enjoys the Tribe's sovereign immunity. SMC points to sections 2-2-103 and 10-4-106 of the Sioux's Tribal Law and Order Code ("Code") which reserve sovereign status and immunity for tribal entities. While SMC admits the Tribe may waive its sovereign immunity, SMC contends there was no waiver in this case since SMC and not the Tribe itself signed the Letter of Intent. We find this argument unpersuasive.

The Tribe itself, by passing section 10-4-106(1) of the Code, provides that sovereign immunity may be limited by a tribal entity's charter. SMC's charter does just that, providing that sovereign immunity "is hereby expressly waived with respect to any written contract entered into by the Corporation." SMC Charter § 4.2.2. On similar facts, several courts have considered a tribal corporation's sovereign immunity waived by a written contract. *See Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 28 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975).

Even if we did not consider the foregoing a clear waiver of any sovereign immunity SMC may enjoy, we find the Letter of Intent itself forecloses argument on this point. As we mentioned at the outset, the Letter of Intent contains a provision specifically dealing with sovereign immunity. Under that section, SMC and the Tribe agreed to "waive all sovereign immunity in regards to all contractual disputes." Assuming the Letter is a valid contract, we agree with the court below and conclude the Tribe and SMC have waived sovereign immunity.

C. TRIBAL EXHAUSTION

The last issue to be dealt with is whether or not the doctrine of "tribal exhaustion" bars this lawsuit. The doctrine requires litigants, in some instances, to exhaust their remedies in tribal courts before seeking redress in federal courts. The leading cases on tribal exhaustion are *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and it is to these cases that we now turn.

In *National Farmers Union* a Crow Indian minor was hit by a motorcycle in the parking lot of a school located within the Crow Indian Reservation, but on land owned by the State of Montana. Through his guardian, the boy sued the school district in the Crow Tribal Court and the court awarded default damages to the boy. After being notified of the award, the school district and its insurer, National Farmers Union, alleged the existence of a federal question and sought injunctive relief in federal district court. The district court granted the insurance company and school district a permanent injunction against any execution of the tribal court judgment. The Supreme Court found the district court's action premature.

In the Court's opinion, the tribal court should have had "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. 471 U.S. at 856. This meant that the petitioners should "have exhausted

the remedies available to them in the Tribal Court system" before a federal court considered "any relief." *Id.* at 857. This rule, felt the Court, would further Congress's policy of "supporting tribal self-government and self-determination." *Id.* at 856. The Court remanded the case to the district court to determine whether the federal action should be dismissed or stayed pending exhaustion of tribal court remedies. *Id.* at 857.

Two years later, in *Iowa Mutual*, the Court addressed the question of "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction." 480 U.S. at 11. The case started when a member of the Blackfeet Indian Tribe filed a complaint in the Blackfeet Tribal Court against his employer and his employer's non-Indian insurance company. The employer was a Montana corporation which was owned by members of the Blackfeet Tribe and operated a ranch on the tribe's reservation.

While the employee's suit was pending in tribal court, the insurance company filed an action in federal district court against the employee and employer alleging it had no duty to defend or indemnify. The district court dismissed the suit for lack of subject-matter jurisdiction, holding that the tribal court should be given the opportunity to determine the tribal court's jurisdiction. The Supreme Court felt dismissal may not have been necessary. As with the doctrine of abstention, the doctrine of tribal exhaustion does not deprive a district court of subject-matter jurisdiction. Exhaustion, the Court explained, is "not a jurisdictional prerequisite," but rather is "a matter of comity." *Id.* at 16 n.8. In addition to dismissing a case, therefore, a district court also has the choice of staying the action pending further tribal court proceedings.

The latter course was the Court's preference in *Iowa Mutual*. The Court felt that the tribal appellate court should have been given the opportunity to review the determination of the lower tribal court: "Until appellate review is complete, the Blackfeet Tribal Courts have not

had a full opportunity to evaluate the claim and federal courts should not intervene." *Id.* at 17. The exhaustion doctrine was to apply regardless of whether the case involved diversity or a federal question. *Id.* at 16.

The Court's decision in this case was motivated by: 1) the federal policy of encouraging tribal self-government; 2) the view that tribal courts "play a vital role in tribal self-government," *id.* at 14-15; and 3) the recognition that "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts." *Id.* at 15. Regarding the scope of a tribal court's jurisdiction, the Court wrote, "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.

It is unclear as to how broadly *Iowa Mutual* and *National Farmers* should be read. On one hand, the two Supreme Court cases dealt only with the situation where a tribal court's jurisdiction over a dispute has been challenged by a later-filed action in federal court. On the other hand, the policies underlying the two cases seem broader than this narrow context. Several appellate courts, consequently, have applied the tribal exhaustion rule to cases in which there existed no first-filed tribal court action. *See, e.g., Brown v. Washoe Hous. Auth.*, 835 F.2d 1327 (10th Cir. 1988); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986). Indeed, the Ninth Circuit has suggested that the exhaustion rule applies mandatorily to all cases relating to tribal or reservation affairs. *See, e.g., Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991).

The court below correctly noted, however, that even Circuits favoring a broad reading of the tribal exhaustion rule find it necessary to examine the factual circumstances of each case. This must be done in order to determine whether the issue in dispute is truly a reservation affair

entitled to the exhaustion doctrine. The Ninth Circuit case of *Burlington Northern* is an example of this individualized examination. In that case the Crow Tribe passed an ordinance establishing a tribal commission to regulate railroads crossing their reservation. The only affected railroad obtained a declaratory judgment in federal court that invalidated the ordinance. The appellate court vacated this judgment, ruling that the railroad was required to exhaust Crow tribal remedies before the district court could take action on the complaint.

Central to the court's holding was its view of the ordinance as being integral to the tribe's self-government and self-determination. The court saw the ordinance both as an assertion of the tribe's sovereign authority and as an instrument of exercising authority over services vital to the tribe's economic development. The court viewed the tribe's economic independence as the "foundation of self-determination." 940 F.2d at 1245. "Thus arises the necessity for . . . exhaustion of tribal remedies: the Crow Tribe must itself interpret its own ordinance and define its own jurisdiction." *Id.* at 1246. *See also Weeks Construction*, 797 F.2d at 673 (contract dispute "arose on the reservation and raises questions of tribal law interpretation within the province of the tribal court").

In the present dispute, the district court found this case to be "a poor candidate for a precedent-setting application of the tribal exhaustion rule." *Altheimer & Gray v. Sioux Mfg. Corp.*, Nos. 91 C 3496 & 91 C 3653, 1991 U.S. Dist. LEXIS 16,799, at **9 (N.D. Ill. Nov. 14, 1991), *amended*, 1992 U.S. Dist. LEXIS 1680 (N.D. Ill. Feb. 13, 1992). As the court observed, the principal dispute between the parties concerns the application of a federal statute, 25 U.S.C. § 81, to the Letter of Intent. The other issues in this litigation concern a contract that both parties agreed would be interpreted under Illinois law. To apply the tribal exhaustion rule would place before the tribal court a dispute that must be resolved by laws of distant jurisdictions. *Cf. Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp.

753 (D.N.D. 1989) (dismissal not necessary where federal issues predominate).

The interpretation of another jurisdiction's laws, however, does not alone foreclose application of the tribal exhaustion rule. A tribal court, presumably, is as competent to interpret federal law as it is state law. *See Iowa Mutual*, 480 U.S. at 19 (alleged incompetence of tribal courts not an exception to exhaustion requirement). The tribal court's potential task of interpreting unfamiliar law, however, does show the dissimilarity of the present case as compared with *National Farmers* and *Iowa Mutual*. Here, there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law.

More importantly, we believe the application of the tribal exhaustion rule would not serve the policies articulated in *Iowa Mutual* and *National Farmers*. As discussed above, the Supreme Court was concerned with implementing Congress's policy of tribal self-government. The Court feared that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16. *See generally Duro v. Reina*, 495 U.S. 676, 692 (1990) (history of modern tribal courts indicate they embody only powers of internal self-governance).

In this case, however, the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum. In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self-determination. If contracting parties cannot trust the validity of

choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught. We therefore affirm the district court's denial of SMC's motion for a stay of proceedings based on the tribal exhaustion rule.

V. CONCLUSION

The judgment of the district court granting summary judgment in SMC's favor is reversed. We remand for proceedings consistent with this opinion. Each party shall bear its own costs.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated November 14, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY,	)	
	)	
Plaintiff,	)	
	)	No. 91 C 3496
v.	)	
	)	Judge Suzanne B. Conlon
	)	
SIOUX MANUFACTURING CORPORATION,	)	
	)	
	)	
Defendant.	)	
	)	Consolidated With
	)	
HEALTH CARE SERVICES, LTD. and JOHN VELERIS,	)	
	)	
	)	
Plaintiffs,	)	No. 91 C 3653
v.	)	
	)	Judge Suzanne B. Conlon
	)	
SIOUX MANUFACTURING CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In this consolidated diversity action for breach of contract, plaintiff Health Care Services, Ltd. ("Health Care"), its president, John Veleris ("Veleris"), and the law firm of Altheimer & Gray (collectively "plaintiffs") sue defendant Sioux Manufacturing Corporation ("Sioux Manufac-

turing").[1] Health Care and Veleris allege that a March 7, 1990 letter of intent between Sioux Manufacturing and Health Care constituted a binding contract under which Health Care would develop and manage a manufacturing facility within the borders of the Devils Lake Sioux Tribal Reservation in Fort Totten, North Dakota. Altheimer & Gray seeks legal fees it is allegedly due as a purported third party beneficiary under the same March 7 letter of intent. Alternatively, Sioux Manufacturing moves for dismissal or summary judgment. Sioux Manufacturing contends that the tribal court exhaustion rule counsels that the court decline to exercise its diversity jurisdiction until plaintiffs exhaust available tribal court remedies. Alternatively, Sioux Manufacturing asserts that the letter of intent is void, as a matter of law, because it does not bear the approval of the Secretary of the Interior, as required under 25 U.S.C. § 81.

BACKGROUND

Health Care is an Illinois corporation with its principal place of business in Cook County, Illinois. Health Care complaint ¶ 1; Sioux Manufacturing 12(m) Statement of Material Facts ("Sioux Manufacturing facts") ¶ 6. Sioux Manufacturing is a tribally chartered corporation and governmental subdivision of the Devils Lake Sioux Tribe ("the Tribe"), organized under the Tribe's Law and Order Code, § 10, ch. 4. *Id.* ¶ 2; Sioux Manufacturing facts ¶ 1.

---

[1] At the time of the events at issue, plaintiff Health Care operated under the name Medical Supplies & Technology, Inc. Plaintiff Veleris was president of Medical Supplies & Technology, Inc. Medical Supplies recently changed its name to Health Care Services, Limited. For the sake of clarity, the corporate plaintiff will be referred to as Health Care, the name under which it brings this action.

Sioux Manufacturing's offices and sole facility is located within the exterior boundaries of the Devils Lake Sioux Tribal Reservation in Fort Totten, North Dakota. *Id.*; Sioux Manufacturing facts ¶ 5. Sioux Manufacturing is the largest employer and source of government revenue on the Devils Lake Sioux Tribal Reservation. Sioux Manufacturing facts ¶¶ 12-14; Altheimer & Gray 12(n) Statement of Material Facts ("Altheimer & Gray facts") ¶¶ 12-14.

On March 7, 1990, Veleris, acting in his capacity as president of Health Care, entered into an agreement designated as a "letter of intent" with Sioux Manufacturing. *Id.* ¶ 3; Exh. B. The agreement contemplated a relationship in which Health Care would sell to Sioux Manufacturing the necessary industrial equipment for and provide its expertise in the production and marketing of various latex medical products in facilities to be located on the tribal reservation. Letter of intent at 1. The letter of intent stated that Health Care would act as exclusive management consultant to Sioux Manufacturing regarding the operation of the business, in return for which Health Care would receive a consulting fee and a significant share of net profits for as long as six and one-half years. *Id.* §§ 3-8. The agreement further stated an understanding that Health Care and Sioux Manufacturing subsequently would enter into a series of contractual agreements setting out in greater detail the nature of their respective obligations. *Id.* at 1. Additionally, the terms of the agreement expressly stated that neither party was obligated to enter the future agreements unless certain express conditions precedent had been met. *Id.* § 1.

The letter of intent contained an expenses clause obliging "the Sioux" to pay "all reasonable legal and accounting fees and expenses" incurred by Veleris and Health Care in the negotiation of the letter of intent and any

of the contemplated subsequent contracts in the event that the parties did not consummate the contracts by the designated closing date. *Id.* § 13. Altheimer & Gray, a Chicago-based law firm, provided Health Care with legal services in connection with the negotiation of the letter of intent.

The agreement contemplated the closing of all subsequent contracts within sixty days of the acceptance of the letter of intent. *Id.* However, Sioux Manufacturing and Health Care executed two subsequent agreements that extended the closing deadline until November 1, 1990. Health Care complaint ¶ 6; Sioux Manufacturing facts ¶ 23. Following the execution of the letter of intent, but prior to the consummation of any of the contracts contemplated under the letter of intent, Health Care and Veleris began operations on the Devils Lake Sioux Reservation. Sioux Manufacturing facts ¶¶ 21, 22; Altheimer & Gray facts ¶¶ 21, 22.

Health Care contends that Sioux Manufacturing failed to act in good faith to satisfy contractual conditions precedent, and in particular, failed to arrange project financing. Health Care complaint ¶ 7. Sioux Manufacturing's failure to meet its obligations precluded a November 1, 1990 closing. *Id.* ¶ 8. After November 1, 1990, Sioux Manufacturing refused to undertake further efforts satisfy the terms of the letter of intent. *Id.* ¶ 9. Health Care contends that Sioux Manufacturing's conduct constitutes a unilateral breach of contract and a breach of the express and implied covenant of good faith governing the agreement. *Id.* ¶ 10. Health Care seeks over $7,000,000 in damages for expenses and loss of earnings. Altheimer & Gray, filing a claim as a purported third party beneficiary to the letter of intent, seeks payment for legal services it provided in connection with the Health Care-Sioux Manufacturing venture.

DISCUSSION

Sioux Manufacturing characterizes its motions as alternative motions for dismissal or summary judgment. Both Sioux Manufacturing and plaintiffs extensively rely upon affidavits and exhibits submitted in connection with the present motions. Consequently, Sioux Manufacturing's motions are treated as summary judgment motions. *See* Fed. R. Civ. P. 12(c).

Summary judgment must be granted when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 959 (7th Cir. 1989). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir. 1989). The nonmoving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Renovitch v. Kaufman*, 905 F.2d 1040, 1044 (7th Cir. 1990). All reasonable inferences must be viewed in favor of the nonmoving party. *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989).

I. Tribal Exhaustion

Sioux Manufacturing contends that the tribal exhaustion rule articulated in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), warrants dismissal or a stay of federal court proceedings until Health Care and Altheimer & Gray exhaust their tribal remedies. Under

the rule, exhaustion of tribal remedies is regarded as a prerequisite to a federal court's exercise of diversity jurisdiction in certain cases related to reservation affairs. *Id.* In both *Iowa Mutual* and *National Farmers Union*, a non-Indian challenged a tribal court's exercise or claim of jurisdiction in a prior-filed tribal court action. The Supreme Court, noting the federal government's longstanding policy of encouraging tribal self-government and self-determination, held that a federal court, as a matter of comity, should defer the exercise of its jurisdiction in a case "relating to reservation affairs" to give a tribal court a full opportunity to determine and exercise its own jurisdiction. *Iowa Mutual*, 480 U.S. at 15.

In the present action, there is no competing tribal court case to bring this case directly within the facts of *National Farmers Union* and *Iowa Mutual*. The scope of the tribal exhaustion rule is a question of first impression in this circuit. The courts of appeal in other circuits, however, have applied the tribal exhaustion rule to cases in which there existed no first-filed tribal court action competing with the federal action. *See, e.g., Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1988); *Weeks Construction, Inc. v. Oglalla Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986). But even in extending the application of the rule, circuit courts appear internally divided over the full extent of its scope.

Within the Ninth Circuit, for example, some decisions suggest that the rule applies mandatorily to all cases relating to tribal or reservation affairs, *see, e.g., Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991); *see also Weeks Constr., Inc.*, 797 F.2d 668 (8th Cir. 1986). Yet, in cases within the same circuit, the court expressly held that the rule does not apply mandatorily, but instead "countenance[s] an examination of the

circumstances of the action before a decision to defer is made." *Stock West Corp. v. Taylor*, 942 F.2d 655, 660-61 (9th Cir. 1991); *see also United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987); *Myrick v. Devils Lake Sioux Manufacturing Corporation*, 718 F. Supp. 753 (D.N.D. 1989). The limited circumstances where the Supreme Court has applied the tribal exhaustion rule suggest the latter measured and contextual application of the rule.

The present case offers truly unique circumstances that make it a poor candidate for a precedent-setting application of the tribal exhaustion rule. However, in deference to the considerations of comity animating the rule, the following observations are appropriate.

The principal dispute between the parties concerns the validity of the letter of intent. Sioux Manufacturing asserts that the letter of intent is invalid because it does not bear the approval of the Secretary of Interior, required under 25 U.S.C. § 81. Health Care contends that the letter of intent is not subject to § 81 protection. The application of the tribal exhaustion rule with respect to this potentially determinative issue would place before the tribal court a dispute essentially dependent upon the construction and application of federal law.

The second observation assumes that the letter of intent is valid. Section 9 of the letter of intent reads:

> [Sioux Manufacturing] and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes. This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. [Sioux Manufacturing], [Health Care] and the Tribe agree to submit to the venue and jurisdiction of the federal and state

> courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts. [Sioux Manufacturing] and the Tribe appoint [a named designee] to accept service of process in any such dispute. [Sioux Manufacturing], [Health Care] and the Tribe hereby waive their respective rights to demand a jury trial.

This language manifests an unambiguous intent that all disputes be resolved under Illinois law in the federal and state courts located in Illinois. Sioux Manufacturing takes issue with any construction of the letter of intent that regards the forum selection clause as constituting a waiver of exhaustion. Sioux Manufacturing's position is plainly contrary to the clear import of the forum selection language. Its position arguably raises the specter of a bad faith assertion of tribal jurisdiction, which the Supreme Court has recognized as an exception to the tribal exhaustion rule. *National Farmers Union*, 471 U.S. at 856 n.21. However, the court need not address the issue of Sioux Manufacturing's good faith in asserting tribal jurisdiction. It is irrefutable that Illinois law governs the execution and interpretation of the letter of intent, regardless of venue. In this respect, application of the tribal exhaustion rule would place before the tribal court a dispute that must be resolved by application of the law of a distant state.

Because these consolidated cases raise issues that principally depend upon application of federal law on the § 81 issue and Illinois law on the merits of the contractual dispute, many reported exhaustion rule cases in which the disputes principally involved issues of tribal law are inapposite. In *Burlington Northern*, for example, the validity of a tribal ordinance regulating common carriers operating on reservation land was challenged. The ordinance had yet to be construed because Burlington Northern had

not challenged the new ordinance in either the tribal administrative or judicial court system. The Ninth Circuit held that deferring the exercise of jurisdiction would allow the tribal court to interpret its own ordinance and thus " 'provide other courts with the benefit of their expertise in such matters.' " 940 F.2d at 1246, quoting *National Farmers Union*, 471 U.S. at 857; *see also Weeks Constr., Inc.*, 787 F.2d at 673 (exhaustion required where facts show that contract dispute "raises questions of tribal law interpretation within the province of the tribal court"). Where "[t]here is no pending tribal court proceeding, the principal issues presented are of state or federal law, and the tribal court possesses no special expertise in the subject matter," comity does not suffice as a basis for deferral of the exercise of federal jurisdiction. *Stock West*, 942 F.2d at 663; *see also Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989) (tribal exhaustion not required in age and race discrimination suit brought by Indian living on reservation against corporation of which tribe was majority owner because federal law issues predominated). Accordingly, Sioux Manufacturing's motion for a stay of proceedings based on tribal exhaustion rule is denied.

II. Failure to Obtain Approval of Secretary of Interior Under 25 U.S.C. § 81

Sioux Manufacturing asserts that the letter of intent creates no enforceable contractual obligations because it does not bear the approval of the Secretary of the Interior required under 25 U.S.C. § 81. Section 81 provides in relevant part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any

> money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: . . . . It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

The Seventh Circuit, in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), after thorough examination of the history of § 81, concluded that the broad statutory language extending protection to transactions "relative to [Indian] lands" must be liberally interpreted to effectuate its purpose of protecting Indian interests. *Id.* at 617-18. The Court thus regarded § 81 as covering nearly all transactions relating to Indian land. *Id.*

Health Care and Veleris effectively contend that the letter of intent bound Sioux Manufacturing to enter into the contemplated venture of developing and operating a manufacturing facility to produce latex products. Altheimer & Gray characterizes the letter of intent as merely an agreement for the allocation of negotiation costs relating to the contemplated business venture between Health Care and Sioux Manufacturing. The differing constructions of the letter of intent are of no significance to the question of the applicability of § 81 in the present case.

The letter of intent is expressly directed toward the development and management of a manufacturing facility to be located "on the Sioux Reservation." Exh. B. at 1. Sioux Manufacturing contends that this language clearly demonstrates that the letter of intent relates to Indian

lands and thus is governed by § 81. Plaintiffs do not dispute the import of this language as indicating that the contemplated facility would be located within the exterior boundaries of the Fort Totten Sioux tribal reservation. Instead, plaintiffs respond that the contemplated operation is not relative to Indian land because the facility was to be located on land that has been assigned by the Devils Lake Sioux Tribal Council to Sioux Manufacturing. Therefore, plaintiffs argue, the land should be regarded as private corporate land beyond the scope of § 81 protection rather than tribal land. The application of § 81 thus depends on the proper characterization of land that is indisputably located on the Sioux Reservation.

Significantly, plaintiffs fail to justify their position in light of the fact that Sioux Manufacturing does not own the land in question, but merely leases trust land from the tribe. McKay Aff. § 5. Regardless how one characterizes its present use, the land remains tribal land. Moreover, plaintiffs' argument also fails to address the significance of Sioux Manufacturing's status as an arm of the Sioux tribal government.

Under its articles of incorporation, Sioux Manufacturing is chartered expressly as "a tribal corporation *and government subdivision* of the Devils Lake Sioux Tribe pursuant to Title 10, Chapter Four of the Devils Lake Sioux Law and Order Code." Sioux Manufacturing Corp. Articles of Confederation §§ 1.2, 4.1 ("Articles") (appended to Altheimer & Gray memorandum in opposition to Sioux Manufacturing's motion for summary judgment) (emphasis added). As a governmental subdivision, Sioux Manufacturing is "clothed by federal and tribal law with all privileges and immunities of the Tribe." *Id.* § 4.21. Additionally, despite its corporate designation, Sioux Manufacturing is "owned in its entirety by the Devils Lake Sioux Tribe," *Id.* § 1.5; McKay Aff. § 3; *see* Exh. B. at p.1.

In determining the significance of Sioux Manufacturing's status as an arm of the tribal government, *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987), is instructive. In *Pueblo of Santa Ana*, the Pueblo tribal governing body created a non-profit enterprise whose stated purpose was to provide for the health, education, and welfare of the Pueblo through the creation of business opportunities and utilization of tribal resources. To this end, the tribal enterprise was empowered to encumber its interests in specifically assigned or leased tribal lands, and to make contracts and sue and be sued in its organizational name. Any agreements made by the tribal enterprise were binding on the corporation alone, with the Pueblo tribe and its officers protected from any resulting liability.

The tribal enterprise executed a long-term contract with a non-Indian consultant for the development, management and operation of a greyhound racing track on tribal property leased to the enterprise. The Secretary of the Interior was not favorably disposed to the project. The tribal enterprise, in conjunction with the tribe, filed an action in federal court contesting whether § 81 governed the contract between the tribal enterprise and the non-Indian management consultant. The tribal enterprise contended that it was not a tribal entity for purposes of the contract with the non-Indian consultant. It argued that its contract with the non-Indian consultant was not subject to § 81 review. The district court rejected this argument, concluding that "Congress could not have mandated that the Secretary review all leases and contracts between Indian and non-Indian only to permit tribes to avoid review when they deem provident." 663 F. Supp. at 1306. Thus, the district court held that § 81 review and approval applied.

Sioux Manufacturing bears many of the same attributes of the tribal enterprise in *Pueblo of Santa Ana*. The stated purposes of Sioux Manufacturing include providing general and specific "revenue to the Tribe to fund programs regarding public health, safety, welfare and for other tribal purposes," Articles §§ 3.2, 3.11-.20; McKay Aff. § 3. The letter of intent between Health Care and Sioux Manufacturing itself reflects another of Sioux Manufacturing's enumerated governmental purposes by expressly stating that Health Care will aid Sioux Manufacturing in implementing hiring guidelines that accord with Sioux Manufacturing's "desire that the Business be operated in a manner which reduces unemployment among the people of the Fort Totten Tribe of the Sioux Nation." Letter of Intent § 3; *see* Articles § 3.1.

That the purposes of Sioux Manufacturing are closely tied to the advancement of core tribal governmental concerns is not surprising in light of the fact that Sioux Manufacturing is the "chief source of tribal income and employment." Devils Lake Sioux Tribe Resolution No. AO5-89-191; McKay Aff. § 7. The interrelationship of Sioux Manufacturing and the Tribe is further reflected in the organizational structure of Sioux Manufacturing. As in *Pueblo of Santa Ana*, the Tribal Council, the governing body of the Sioux Tribe, controls all appointments to the Sioux Manufacturing board of directors. McKay Aff. § 4. Moreover, half of the Sioux Manufacturing board must be comprised of the six sitting members of the Sioux Tribal Council, with the Tribal Council Chairman sitting as the chairman of the Sioux Manufacturing board. *Id.*

Finally, the letter of intent strongly suggests that plaintiffs themselves viewed the Tribe and Sioux Manufacturing as closely interrelated. According to plaintiffs, the parties to the letter of intent were Health Care, its officers, and Sioux Manufacturing. Yet the language of the letter

of intent clearly suggests that plaintiffs regarded the Tribe as an active participant in the contemplated transactions. Various provisions of the letter of intent, including the allocation of expenses clause upon which Altheimer & Gray bases its claim, are directed to both the Tribe and Sioux Manufacturing, referring to them collectively as "the Sioux."[2] Letter of intent § 13.

The letter of intent does refer to the Tribe individually, as distinct from Sioux Manufacturing. For instance, the provision containing the waiver of sovereign immunity, choice of law and forum selection clauses is directed individually to the Tribe, as well as to Sioux Manufacturing. Letter of intent § 9. Yet the letter of intent contains only signature blocks for representatives of Health Care and Sioux Manufacturing. *Id.* at p. 9. Thus, plaintiffs appear to have regarded the signature of Sioux Manufacturing as generally binding the Tribe itself to the terms of the letter of intent.

Sioux Manufacturing's enumerated purposes, organizational structure, and impact on the tribal community are fully consistent with its express designation as an arm of the tribal government. The plaintiffs, as drafters of the letter of intent, also appear to have regarded Sioux Manufacturing and the Tribe as essentially the same entity.

---

[2] The shifting designation of the Tribe and Sioux Manufacturing arguably creates some ambiguity in the meaning of the expenses clause allocating to "the Sioux" the costs of legal fees incurred in negotiations. Under Illinois law, ambiguous contract language is generally construed against the drafter of the language. Here, Altheimer & Gray drafted the agreements as counsel for Health Care. *Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 505 N.E.2d 314, 319 (1987). Thus, Altheimer & Gray's claim, though based on a more narrowly tailored construction of the letter of intent than that asserted by Health Care, also appears to be based on language that directly binds the Tribe as well as Sioux Manufacturing.

Under these circumstances, the tribal law designation of Sioux Manufacturing as a corporation for the apparent purpose of protecting the Tribe's larger trust holdings should not be viewed as removing Sioux Manufacturing and the leased tribal land on which its facilities are located from the broad scope of § 81 review. The letter of intent relates to a business venture between an Indian and a non-Indian organization to be located on tribal land and thus required the approval of the Secretary of Interior. Absent that approval, the letter of intent is null and void under § 81. Sioux Manufacturing is entitled to judgment as a matter of law because plaintiffs' breach of contract claims are based upon an invalid contract.[3]

CONCLUSION

Sioux Manufacturing's motion to stay proceedings under the tribal exhaustion rule is denied. Sioux Manufacturing's motion for summary judgment on the grounds that the letter of intent is null and void under 25 U.S.C. § 81 is granted. Judgment is entered for defendant Sioux Manufacturing Corporation and against plaintiff Altheimer & Gray (Case No. 91 C 3496), and for defendant Sioux Manufacturing Corporation and against plaintiffs Health Care Services, Ltd. and John Veleris (Case No. 91 C 3653).

ENTER:

/s/ SUZANNE B. CONLON
Suzanne B. Conlon
United States District Judge

November 14, 1991

[3] Because the court finds the letter of intent void under § 81, there is no need to reach the issue whether the letter of intent is void under other statutory provisions advanced by Sioux Manufacturing.

[Dated February 13, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY, Plaintiff, v. SIOUX MANUFACTURING CORPORATION, Defendant.	No. 91 C 3496 Judge Suzanne B. Conlon
Consolidated With	
HEALTH CARE SERVICES, LTD. and JOHN VELERIS, Plaintiffs, v. SIOUX MANUFACTURING CORPORATION, Defendant.	No. 91 C 3653 Judge Suzanne B. Conlon

MEMORANDUM OPINION AND ORDER

Plaintiffs Altheimer & Gray and Health Care Services, Inc. ("Health Care") (collectively "plaintiffs") move pursuant to Fed. R. Civ. P. 59(e) to vacate this court's grant of summary judgment to defendant Sioux Manufacturing Corporation ("Sioux Manufacturing") on plaintiffs' consoli-

dated breach of contract claims. *See* Memorandum Opinion and Order of November 14, 1992. Summary judgment was granted in favor of Sioux Manufacturing because the agreement at issue had not been approved by the United States Department of the Interior as required by 25 U.S.C. § 81 for agreements for services to Indians relative to Indian lands.

DISCUSSION

Plaintiffs respectfully move to vacate this court's grant of summary judgment in favor of defendant Sioux Manufacturing to the extent that judgment applied to a negotiation cost allocation provision contained in the letter of intent between Health Care and Sioux Manufacturing. As an initial matter, the court must address Sioux Manufacturing's contention that Health Care's motion is untimely.

I. Timeliness of Health Care's Rule 59(e) motion

Rule 59(e) motions must be filed "not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e); *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 110 (7th Cir. 1985). Judgment was entered in the present action on November 15, 1991, at the time this court's November 14, 1991 order was docketed with the clerk of court. Health Care filed its present Rule 59(e) motion on December 3, 1991.

Health Care asserts that its December 3, 1991 filing meets the ten day statutory period, excluding holidays and weekends. Health Care's calculation is erroneous. December 3, 1991 was the eleventh working day to follow the November 15, 1991 entry of order. Health Care erred in calculating the day after Thanksgiving as a court holiday. In support of its contention that the day following Thanksgiving was a holiday, Health Care submits a legal notice

showing the day after Thanksgiving to be a legal holiday of the Illinois *state* court system. State court holidays, of course, have no bearing on the operation of the federal court system. District courts lack the authority to extend the mandatory ten day period for filing Rule 59(e) motions. *Marane, Inc.*, 755 F.2d at 111. Accordingly, Health Care's motion is denied as untimely.

II. Altheimer & Gray's Motion

Altheimer & Gray raises two arguments in support of its motion to vacate. First, Altheimer & Gray contends the March 7, 1990 agreement between Health Care and Sioux Manufacturing did not impose any obligation regarding the use of Indian land and was therefore not subject to the approval of the Secretary of the Interior pursuant to 25 U.S.C. § 81. Altheimer & Gray asserts that each signatory to the agreement intended to obligate itself only to bear the negotiation costs of the other under certain specified conditions.

Altheimer & Gray argument merely reasserts issues addressed by the court in granting Sioux Manufacturing's motion for summary judgment. Under 25 U.S.C. § 81, the Secretary of the Interior's approval is required not only for agreements regarding the *use* of Indian land, as Altheimer & Gray argues. Rather, § 81 requires the Secretary of the Interior's approval of all agreements "relative" to Indian land. 25 U.S.C. § 81. Altheimer & Gray's argument tying the application of § 81 to agreements for the actual use of Indian lands runs counter to the federal court's unfailingly expansive construction of the term "relative to [Indian] lands" as providing § 81 with an extraordinarily broad scope. Indeed, the Seventh Circuit in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), recently reviewed a frontal attack on

the broad scope of § 81 afforded under the "relative to [Indian] land" provision. After a thorough examination of the history and application of § 81, the Seventh Circuit concluded that the statutory language requiring approval of agreements "relative to [Indian] lands" must be interpreted liberally to cover nearly all transactions relating to Indian lands. *See Koberstein*, 762 F.2d at 617-18.

Altheimer & Gray's attempt to avoid the pervasive scope of § 81 by asserting that the signatories to the agreement did not intend to commit themselves to obligations that would bring the agreement within the scope of § 81 scrutiny does not deflect from the fact that the agreement was inextricably rooted in a planned transaction regarding Indian land. Moreover, if the intent of signatories to an agreement relative to Indian land dictated when § 81 scrutiny applies, contracting parties could readily thwart Congress' clear intent to protect Indians from " 'improvident and unconscionable contracts,' " *Koberstein*, 762 F.2d at 617, quoting *In re Sanborn*, 148 U.S. 222, 227 (1893).

Altheimer & Gray advances a second argument in which it contends that the negotiation cost allocation provision is separable from the remainder of the agreement and thus, standing alone, did not require the approval of the Secretary of the Interior pursuant to 25 U.S.C. § 81. Acceptance of Altheimer & Gray's separability argument would also undermine Congress' broad protective purpose in enacting § 81. *Id.* Parties could effectively enforce individual provisions of an agreement relating to Indian lands that had not been approved by the Secretary of Interior merely by artfully drafting the provisions in a manner permitting separability.

Altheimer & Gray cites *Rollins and Presbrey v. United States*, 23 Ct. Cl. 106 (1888) as supporting its separability argument. However, *Rollins and Presbrey* is factually distinguishable from the present case. *Rollins and Presbrey* involved a claim by attorneys for an Indian tribe to enforce a single contractual provision that had been separately approved by the Secretary of the Interior, even though it was part of a contract that the Secretary of the Interior had not approved in its entirety. The court held that the individually approved provision was separable and separately enforceable. 23 Ct. Cl. at 124-125. In the present action, the negotiation cost allocation provision that provides the purported basis of Altheimer & Gray's claim was not approved by the Secretary of the Interior, unlike the provision the court in *Rollins and Presbrey* held to be separable. Thus, *Rollins and Presbrey* is inapposite.

Finally, in the course of presenting its arguments in support of its motion to vacate, Altheimer & Gray highlights certain evidence that calls into question the factual accuracy of a footnote comment in the November 14, 1991 memorandum opinion. The court suggested that any ambiguity in the language of the agreement should be construed against Altheimer & Gray as the drafter of the agreement. *See* November 14, 1991 Memorandum Opinion and Order at 15 n.2 & 16. Altheimer & Gray correctly notes that the affidavit of attorney Martha Haines, appended as Exhibit A to Altheimer & Gray's response to Sioux Manufacturing's motion for summary judgment, states that the agreement incorporates language jointly drafted by both parties. Haines Aff. ¶ 10. Accordingly, any ambiguities that might exist in the language of the agreement should not necessarily be construed against Altheimer & Gray. Accordingly, the November 14, 1991 memorandum shall be amended to exclude the challenged *dicta*.

CONCLUSION

Plaintiff Health Care's Fed. R. Civ. P. 59(e) motion to vacate is denied as untimely. Plaintiff Altheimer & Gray's motion to vacate is denied. The court's memorandum opinion of November 14, 1991 is amended by deletion of footnote 2 on pages 15-16.

ENTER:

/s/ SUZANNE B. CONLON
Suzanne B. Conlon
United States District Judge

February 13, 1992

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 27, 1993

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

No. 92-1633

ALTHEIMER & GRAY, a partnership,

Plaintiff-Appellant,

v.

SIOUX MANUFACTURING CORPORATION,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 3496—Suzanne B. Conlon, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellee Sioux Manufacturing Corporation on January 22, 1993, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *in banc* be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 8, 1993

BEFORE:

Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Harlington Wood, Jr., Senior Circuit Judge

No. 92-1633

ALTHEIMER & GRAY, a partnership,

Plaintiff-Appellant

v.

SIOUX MANUFACTURING CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 3496, Judge Suzanne Conlon

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is REVERSED and this cause is REMANDED, in accordance with the decision of this court entered this date. Each party is to bear its own costs.

25 U.S.C. § 81

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub.L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the in-

surer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646.)

Devils Lake Sioux Tribal Law and Order Code

* * * * *

Title 2: Courts

* * * * *

§2-2-103. **Suits Against the Tribe.**

(1) **Sovereign Immunity of Tribe.** The sovereign immunity of the Tribe and every elected Tribal Council member or tribal official with respect to any action taken in an official capacity or in the exercise of the official powers of any such office, against suit in any court, federal, state or tribal is hereby affirmed, and nothing contained within this Code shall be deemed to constitute a waiver of such sovereign immunity. The Tribal Court shall have no jurisdiction over any suit brought against the Tribe without the consent of the Tribe.

(2) **Tribal Action Not Waiver of Sovereign Immunity.** Nothing in this Code, and no enforcement action taken pursuant to it, including the filing of an action by the Tribe or any agency of the Tribe in the Tribal Court, shall constitute a waiver of sovereign immunity of the Tribe, or any elected Tribal Council member or tribal official with respect to any action taken in an official capacity, or in the exercise of the official powers of any such office, either as to any counterclaim, regardless of whether the counterclaim arises out of the same transaction or occurrence, or in any other respect.

(3) **Waiver of Sovereign Immunity.** Sovereign immunity of the Tribe and any elected Tribal Council member or tribal official with respect to any action taken in an official capacity or in the exercise of the official powers of any such office, in any action filed in the Tribal Court with respect thereto, may be waived only by express resolution of the Tribal Council after consultation with its attorneys. All waivers of sovereign immunity must be preserved

with the resolutions of the Tribal Council of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to insure that substantial justice can be done by the Tribal Court in any such action. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, action, and property or funds, if any, of the Tribe or any agency of the Tribe subject thereto. No express waiver of sovereign immunity by resolution of the Tribal Council shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe or any agency of the Tribe other than property specifically pledged or assigned.

§2-2-104. **Concurrent Jurisdiction; Exhaustion of Tribal Remedies.**

The jurisdiction invoked by this Code over any person, cause or subject shall be concurrent with any valid federal jurisdiction by the courts of the United States, provided, however, this Code does not recognize, grant, or cede jurisdiction to any other political or governmental entity which does already have such jurisdiction under existing law. Nothing in this Code waives the requirement of exhaustion of tribal remedies, both administrative and judicial, which may only be waived by the Tribal Council in the same manner as it may waive sovereign immunity.

* * * * *

Title 10: Corporations and Tribal Entities

* * * * *

§10-4-104. **Status of a Tribal Entity.**

(1) For purposes of taxation, regulatory jurisdiction and civil jurisdiction, a tribal entity created pursuant to the sovereign powers of the Tribe shall be deemed to be a subordinate arm of the government of the Tribe and shall be entitled to all of the privileges and immunities of the Tribe.

(2) The Tribal Court shall have jurisdiction to decide all questions with respect to the status of a tribal entity formed pursuant to the sovereign powers of the Tribe.

* * * * *

§10-4-106. **Sovereign Immunity and Waiver.**

(1) **Sovereign Immunity of the Tribal Entity.** A tribal entity is clothed by federal law with all the privileges and immunities of the Tribe, except as specifically limited by the tribal entity Charter, including sovereign immunity from suit in any state, federal or tribal court. Nothing in this Chapter shall be deemed or construed to be a waiver of sovereign immunity of a tribal entity from suit or to be a consent of the tribal entity or the Tribe, to the jurisdiction of the United States or of any state with regard to the business or affairs of the tribal entity or to any cause of action, case or controversy, except as provided herein.

(2) **Waiver of Sovereign Immunity of the Tribal Entity.** Sovereign immunity of the tribal entity may be waived only by express resolution of the governing body of the tribal entity after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the governing body of the tribal entity of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the tribal entity. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the tribal entity subject thereto, court having jurisdiction pursuant thereto and law applicable thereunder. Neither the power to sue and be sued provided in the charter of the tribal entity, nor any express waiver of sovereign immunity by resolution of the tribal entity shall be deemed a consent to the levy of any judgment, lien or attach-

ment upon property of the tribal entity other than property specifically pledged or assigned, or any property of the Tribe, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

(3) **Sovereign Immunity of the Tribe.** All inherent sovereign rights of the Tribe as a federally-recognized Indian tribe with respect to the existence and activities of the tribal entity are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in a tribal entity charter shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe or to be a consent of the Tribe to the jurisdiction of the United States or of any state with regard to the business or affairs of the tribal entity or the Tribe or to any cause of action, case or controversy, except as provided herein.

(4) **Credit of the Tribe.** Nothing in a tribal entity charter, nor any activity of any tribal entity, shall implicate or in any way involve the credit of the Tribe.

(5) **Inclusion in Charter.** The provisions of Subsection (1) through (4) of this Section shall be included in the charter of each tribal entity.

Articles Of Incorporation Of Sioux Manufacturing Corporation

* * * * *

Section 4. - Attributes.

4.1 - Governmental Subdivision. The Sioux Manufacturing Corporation is a tribal corporation and a governmental subdivision or subordinate board of the Tribe.

4.2 - Sovereign Immunity and Waiver.

4.2.1 - Sovereign Immunity of the Corporation. The Corporation is clothed by federal and tribal law with all the privileges and immunities of the Tribe, except as specifically limited by these Articles of Incorporation, including sovereign immunity from suit in any state, federal or tribal court. Except as provided in Subsection 4.2.2 below, nothing in these Articles of Incorporation shall be deemed or construed to be a waiver of sovereign immunity of the Corporation from suit, which may only be waived pursuant to Subsection 4.2.3. Except as provided in Subsection 4.2.2 below, nothing in these Articles of Incorporation shall be deemed or construed to be a consent of the Corporation to the jurisdiction of the United States or of any state or of any tribe other than the Devils Lake Sioux Tribe with regard to the business or affairs of the Corporation.

4.2.2 - Waiver of Sovereign Immunity of the Corporation-Contracts. Sovereign immunity of the Corporation is hereby expressly waived with respect to any written contract entered into by the Corporation, and the Corporation hereby expressly consents to the jurisdiction of any court which would have jurisdiction but for the sovereign immunity of the Corporation, including courts of the United States or of any state or of any tribe, with regard to any written contract entered into by the Corporation.

4.2.3 - Waiver of Sovereign Immunity of the Corporation-Other. Sovereign immunity of the Corporation with respect to any matter other than a written contract may

be waived only by express resolution of the Board after consultation with its attorneys. All waivers of sovereign immunity must be preserved with the resolutions of the Board of continuing force and effect. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the Corporation. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any, of the Corporation subject thereto, court having jurisdiction pursuant thereto and law applicable thereto. Neither the power to sue and be sued provided in Subsection 7.6, nor any express waiver of sovereign immunity by resolution of the Board, shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Corporation other than property specifically pledged or assigned, or a consent to suit in respect of any land within the exterior boundaries of the Reservation or a consent to the alienation, attachment or encumbrance of any such land.

4.2.4 - Sovereign Immunity of the Tribe. All inherent sovereign rights of the Tribe as a federally recognized Indian tribe with respect to the existence and activities of the Corporation are hereby expressly reserved, including sovereign immunity from suit in any state, federal or tribal court. Nothing in these Articles of Incorporation nor any action of the Corporation shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe, or to be a consent of the Tribe to the jurisdiction of the United States or of any state or any tribe other than the Devils Lake Sioux Tribe with regard to the business or affairs of the Corporation or the Tribe, or to be a consent of the Tribe to any cause of action, case or controversy, or to the levy of any judgment, lien or attachment upon any property of the Tribe; or a consent to suit in respect of any land within the exterior boundaries of the Reservation, or a consent to the alienation, attachment or encumbrance of any such land.

4.2.5 - Credit of the Tribe. Nothing in these Articles of Incorporation nor any activity of the Corporation shall implicate or in any way involve the credit of the Tribe.

4.3 - Assets of the Corporation. The Corporation shall have only those assets specifically assigned to it by the Council or acquired in its name by the Tribe or by it on its own behalf. No activity of the Corporation nor any indebtedness incurred by it shall implicate or in any way involve any assets of tribal members or the Tribe not assigned in writing to the Corporation.

March 7, 1990

Fort Totten Tribe, Sioux Nation
c/o Robert E. Manning
P.O. Box 400
Fort Totten, ND 58335

Gentlemen:

Medical Supplies & Technologies, Inc., an Illinois corporation ("MST"), hereby submits this Letter of Intent to the Fort Totten Tribe of the Sioux Nation and Sioux Manufacturing Corporation ("Sioux"), to set forth its understanding of the terms of certain proposed transactions by and among MST, John Veleris ("Veleris"), Thomas Klamet ("Klamet") (MST, Veleris and/or Klamet, as appropriate, are referred to as "Seller") and an entity wholly-owned, directly or indirectly, by the Sioux ("Buyer").

Seller and Buyer will produce and market various latex medical products (the "Products") (the production of the Products is referred to as the "Business"), including but not limited to, surgical, specialty and examination gloves, in facilities located on the Sioux Reservation located in Fort Totten, North Dakota. Seller and Buyer will enter into several agreements with each other to perform certain services in relation to the production of the Products. Seller will provide its technology, know-how and expertise in relation to the production and marketing of the Products. Buyer will obtain all government approvals required for these transactions, including any approvals required by the Bureau of Indian Affairs. Buyer will also provide all working capital, investment capital, facilities and labor needed for the production of the Products and the operation of the Business. The details of these proposed transactions will be discussed further by Seller and Buyer and agreed to in good faith and shall be set forth in various contracts and other agreements deemed necessary to implement performance of these transactions. The various contracts shall obligate the Seller and Buyer to

work diligently and in good faith toward completing Phase 5 (as hereinafter defined).

1. *Asset Purchase Agreement.* Seller will sell or cause to be sold to Buyer all of the assets of MST (the "Assets"), tangible and intangible, including but not limited to, Seller's equipment manufacturer contract (and the specifications thereto) with ACC Automation Co., L.P. (the "ACC Contract") for that certain machine (the "Machine") to be used in the production of the Products; computer model manufacturing plans; engineering and equipment specifications; waste and environmental plans; dip form mold specifications; raw materials specifications; marketing and sales plans; architectural and engineering drawings and specifications for the building in which the Products will be produced; organizational plans; financial projection models; management information systems plans; specifications and laboratory tests for the Products; brochures relating to the Products; confidentiality agreements relating to the Products; any trade secrets related to the Products or the Business; and all other assets of MST pursuant to an Asset Purchase Agreement to be entered into by Seller and Buyer (the "Asset Purchase Agreement"). Prior to the execution of the Asset Purchase Agreement, Buyer and Seller will renegotiate the ACC Contract with ACC Automation Co., L.P. on terms mutually agreeable to Buyer and Seller. After the renegotiation of the ACC Contract, Seller will assign all its rights under the ACC Contract to Buyer. All of the Assets to be sold by Seller to Buyer at Closing will be owned by Seller free of any claims of third parties except as disclosed by Seller to Buyer prior to Closing and will be clearly identified and defined in the Asset Purchase Agreement. It is understood by Buyer and Seller that neither party will be required to enter into the Asset Purchase Agreement, or any other agreement contemplated by this Letter of Intent, unless and until all of the conditions to Closing (as defined below) specified in Section 10 of this Letter of Intent are fulfilled though all parties are hereby bound in good faith to attempt to fulfill all such conditions.

2. *Certified Expenses; Manner of Payment.* Buyer shall pay to Seller, pursuant to the Asset Purchase Agreement, the aggregrate amount of those certified expenses of Seller incurred previously (the "Certified Incurred Start-up Expenses"). In addition to these expenses are expenses incurred for legal, accounting and other professional services relating to these transactions (the "Certified Incurred Professional Expenses"). The Certified Incurred Start-up Expenses are estimated to be $645,247 as of the date hereof, and the Certified Incurred Professional Expenses are estimated to be $225,000 as of the date hereof. The Certified Incurred Start-up Expenses and the Certified Incurred Professional Expenses (collectively, the "Certified Expenses") will be agreed to by Seller and Buyer prior to the execution of the Asset Purchase Agreement, but in no event shall exceed $870,000 (the execution of the Asset Purchase Agreement and all other documents necessary to start the Business will be referred to as the "Closing" and the date of the Closing as the "Closing Date"). On the Closing Date, Buyer agrees to pay to Seller, in cash, an amount equal to the Certified Expenses and Buyer and Seller also agree to enter into a Consulting Agreement (as defined below). The Closing shall take place at 9:00 a.m., local time, on April 4, 1990 at the offices of Altheimer & Gray, 10 S. Wacker Drive, Suite 4000, Chicago, Illinois, or at such other place and time as shall be mutually agreeable to Buyer and Seller.

3. *Consulting Agreement.* Seller, on the Closing Date, will enter into an agreement with Buyer whereby Seller will provide consulting services to Buyer for the management and operation of the Business (the "Consulting Agreement"). Seller will supply technical and engineering assistance, market the Products and train certain individuals designated by Buyer in the management and operation of the Business. Seller will also agree to comply with mutually agreed upon standards of performance such as production efficiency rates, scrap material rates and the like. In accordance with Buyer's desire that the Business be operated in a manner which reduces unemployment

among the people of the Fort Totten Tribe of the Sioux Nation while continuing toward optimum profitability, Buyer will implement appropriate guidelines, developed after consultation with Seller, with respect to employee hiring.

Pursuant to the Consulting Agreement, Seller will pay all reasonable and appropriate expenses incurred in the employment of four consultants (the "Production Consultants"). Buyer will reimburse Seller for all certified expenses incurred by Seller in the employment of the Production Consultants ("Certified Consultant Expenses") as follows: Buyer will pay to Seller eight payments of $125,000, one every three months until eight payments are made *unless* those conditions constituting Phase 5 (as defined below) are fulfilled. If Phase 5 is completed prior to the conclusion of the eight three month periods in which Buyer is required to reimburse Seller under this Section 3, only those Certified Consultant Expenses incurred prior to the achievement of Phase 5 will be reimbursed; in no event will Buyer be required to reimburse Seller for any Certified Consultant Expenses incurred after the attaining of Phase 5. The Certified Consultant Expenses will be determined as soon as practicable at the end of every three months in a manner mutually agreeable to Buyer and Seller. Buyer will pay the first $125,000 on the Closing Date. If, for any three month period, the Certified Consultant Expenses are less than $125,000, such excess ("Available Excess") will be held by Seller and applied towards the next reimbursement payments due from Buyer for the Certified Consultant Expenses in excess of $125,000 for any subsequent three month period. If, for any three month period, the Certified Consultant Expenses exceed the sum of $125,000 and the Available Excess (if any), Buyer will further reimburse Seller for such excess expenses up to an amount equal to $12,500 per three month period ("Overage Payment") during which such excess exists. The maximum allowable Overage Payments, if not used, shall be cumulative. In the event Seller incurs Certified Consultant Expenses in any three month

period in excess of the $125,000 reimbursement payment, all of the Available Excess and all accumulated Overage Payments, Seller will be allowed to carry forward such excess Certified Consultant Expenses into the succeeding three month period(s). Buyer's total reimbursement of Seller will not, under any circumstances, exceed the lesser of the Certified Consultant Expenses or $1,100,000. The example attached as Exhibit A shall be used to demonstrate this intent of the parties in applying this paragraph.

4. *Minimum Participation.* In addition to the reimbursement payments, Seller, upon the attaining of Phase 5, has the right to receive from the Buyer the gross sales of the Products, subject to an appropriate adjustment for sales returns ("Gross Sales"), multiplied by 4.00% (the "Minimum Participation Fee") until Termination. The Minimum Participation Fee will be payable at least quarterly to Seller within sixty days (60) after the end of each quarter of the fiscal year of the Business.

5. *Net Profit Percentage Fee.* In addition to the reimbursements by Buyer under Section 3 and the Minimum Participation Fee, the Consulting Agreement will provide that Seller will also be entitled to a percentage of the Net Profits (as defined below) of the Business upon completion of Phase 5 (the "NPP Fee"). The NPP Fee is in addition to, and not in lieu of, all other fees due Seller contemplated by this Letter of Intent until Termination. The NPP Fee will be determined as follows: (a) the Applicable Percentage (as defined below) multiplied by Net Profits (as defined below) minus (b) the Minimum Participation Fee. The NPP Fee will be payable annually within sixty (60) days after the end of the fiscal year of the Business. The Applicable Percentage will be determined as follows (subject to any revision mutually agreed upon by Buyer and Seller): if Phase 5 is completed within 28 months of the conclusion of the renegotiation of the terms of the ACC Contract the Applicable Percentage will be 30%; if Phase 5 is completed in more than 28 months but within 34 months, the Applicable Percentage will be 25%;

and if Phase 5 is completed in more than 34 months but within 40 months, the Applicable Percentage will be 20%. If Phase 5 is not completed within 40 months, the Consulting Agreement may be terminated by the Buyer. For purposes of the Consulting Agreement, Net Profits will equal the difference between Gross Sales and (a) cost of materials; (b) wages (in an amount mutually agreeable to Buyer and Seller); (c) utilities and maintenance; (d) salaries and administration (in an amount mutually agreeable to Buyer and Seller); (e) costs paid to Veleris for consulting under the Consulting Agreement; (f) rent; (g) taxes (it being understood, however, that the amount of taxes imposed by tribal authorities to be deducted from Net Profits will not exceed 1% of gross sales); (h) other operational costs (to be agreed to by Buyer and Seller); (i) $83,334 per year; and (j) the Applicable Percentage of depreciation of equipment calculated on a straight line basis over 30 years. There will be no deduction from Net Profits for debt service expenses (including, but not limited to, any interest payments). In the event the Business has incurred losses for prior years, the NPP Fee shall be reduced by the product of the Applicable Percentage multiplied by the losses of such prior year(s). However, losses incurred prior to the actual commencement of the production of the Products shall not reduce the NPP Fee. Losses for the year in which such production begins shall be prorated beginning with the month in which production begins. In order to facilitate the Closing, Buyer will provide an analysis of manufacturing costs to be incurred.

6. *Retention Amount.* Buyer will retain from the NPP Fee an amount equal to the Applicable Percentage of the NPP Fee (the "Retention Amount").

7. *Termination Fee.* Seller has the right to put (the "Put Right"), and Buyer has the right to call (the "Call Right"), all of Seller's rights to receive the NPP Fee and the Minimum Participation Fee ("Termination") beginning on the day which is six and one half years after the Closing Date. Notice of the exercise of such Termination shall

be given to the other party not less than one year in advance and shall specify a termination date (the "Termination Date"). In the event of Termination, Seller will be entitled to a termination fee determined according to the appropriate formula set forth in *Exhibit B*; the Put Fee is applicable in the event of exercise of a Put Right and the Call Fee is applicable in the event of exercise of a Call Right (the "Termination Fee"). The choice of an independent appraiser, as necessary per the formula in *Exhibit B*, will be mutually agreed upon by Buyer and Seller. Fees of the appraiser shall be paid by Buyer. The Termination Fee will be payable over five years from the Termination Date and will be subject to market interest (such interest rate will be the prime rate announced by a bank mutually agreeable to Buyer and Seller). Upon Termination, Seller will not be entitled to a Minimum Participation Fee or NPP Fee, but will be entitled to a fee (the "Reduced Minimum Participation Fee") equal to 2% of Gross Sales of the Business for each of the three years ending upon the third anniversary of the Termination Date and 1.5% of Gross Sales of the Business for each of the next seven years thereafter. In no event will Gross Sales of the Business subject to the Reduced Minimum Participation Fee exceed, for any year, the average of Gross Sales of the year preceding Termination Date, the year of the Termination Date, and the year following Termination Date.

8. *Exclusivity.* The Seller retains the exclusive rights to serve as consultant to the Business and is entitled to the Minimum Participation Fee and the NPP Fee prior to Termination and to the Reduced Minimum Participation Fee and the Termination Fee thereafter for all latex products and polymer gloves produced by the Business, whenever and however developed, in a manner to be agreed upon by the parties hereto.

9. *Sovereign Immunity.* Buyer and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes.

This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. The Buyer, the Seller and the Tribe agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts. Buyer and the Tribe appoint Mark J. Jacobs to accept service of process in any such dispute. The Buyer, the Seller and the Tribe hereby waive their respective rights to demand a jury trial.

10. *Closing.* The Closing of the transactions contemplated by this Letter of Intent will take place within sixty (60) days following acceptance of this Letter of Intent. The Closing is contingent upon the satisfaction of the following conditions:

(a) Buyer secures a commitment for adequate financing to complete Buyer's obligations as contemplated in this Letter of Intent on terms acceptable to Buyer.

(b) Seller is able to deliver, to Buyer's satisfaction, adequate sales and marketing contracts.

(c) Substantially all distributors and marketing representatives are ready, able and willing to perform their obligations under their contracts with Seller.

(d) Seller and Buyer have successfully renegotiated the ACC Contract and Buyer has secured a letter of credit for ACC agreeable to ACC.

(e) Delivery of appropriate releases or indemnification concerning the previous investor in M.S.T.

11. *Confidentiality.* The parties to this letter reaffirm their Confidentiality Agreement.

12. *Definition of Phase 5.* When used in this Letter of Intent, the term "Phase 5" will mean that period in time in which the Business has fulfilled, based on the mutual, good faith efforts of Buyer and Seller, the following targets:

(a) complete installation of the production line and packaging equipment necessary for the production of the Products;

(b) successful completion of the Production Line Final Acceptance Test (as specified and defined in the ACC Contract);

(c) a product on line speed of 25 ft./min. (18,000 gloves per hour);

(d) an on-line rejection rate of a maximum of 4% (720 gloves per hour);

(e) the Products meeting all FDA specifications;

(f) installation of three shifts (day, evening and night);

(g) completion of a quality assurance program (as per FDA requirements); and

(h) training of labor, supervisors and production management (based on a mutually agreed pre-submitted plan).

13. *Expenses.* If the transactions contemplated herein are consummated, each party hereto (or an entity controlled by or affiliated with any of them) will pay all of its own fees and expenses incurred in connection with the formation of the Business, including all promotional, printing, postage and travel expenses and all expenses of legal counsel and accountants. If the transactions contemplated hereby are not consummated within 60 days from the date hereof or if the Sioux at any time notifies any other party that they are terminating negotiations with respect to the matters described herein, the Sioux shall promptly pay, upon demand, all reasonable legal and accounting fees and expenses incurred by Veleris, Klamet or MST (or an entity controlled by or affiliated with any of them) in connection with the negotiation of this Letter of Intent, the negotiation of any agreements or contracts contemplated hereby and the promotion of the Business after the date hereof, including all printing, postage and travel expenses

but before receipt of such notice; provided, however, that if the transactions contemplated hereby are not consummated within 60 days from the date hereof due to actions taken in bad faith by Seller, all reasonable fees and expenses incurred by Buyer shall be paid by Seller.

If you desire to pursue this matter on the terms contained in this Letter of Intent, please so indicate by signing and returning a copy of this Letter of Intent enclosed for that purpose.

Very truly yours,

MEDICAL SUPPLIES AND TECHNOLOGIES, INC.

By: /s/ JOHN VELERIS
President

The above is hereby agreed to and accepted this seventh day of March, 1990.

SIOUX MANUFACTURING CORPORATION

By: /s/ ROBERT MANNING
Title: V.P. & Gen. Mgr.

cc: Thomas Klamet

Exhibit A

"Certified Consultant Expenses" Payment Example

Assumes Payment of $125,000

Period	Cumulative Buyer Payment	Cumulative Seller Certified Costs	Shortage or <Excess> Cost	Buyer Reimbursement Overage Payment	Notes
1	125	100 (100)	25	None	None
2	250	250 (150)	—	None	None
3	375	410 (160)	<35>	35	35 Less than 12.5 X 3
4	535	551 (141)	<16>	15	Limit to Total Overage of Overage Paid or $50 - 35 = 15
5	675	687 (136)	<12>	12	Limit to total overage of 12.5 X 5 Less Prior Overage Amounts paid but never more than shortage or $75 - 50 = 25 but not more than 12

Summary

Summary Total Payments Made by Buyer	$ 675
	+ 12
	687
Total Costs Incurred by Seller	687
Excess	$ 0

Maximum Allowed 125.0 X 5 X 1.1 or $687.5 Not Exceeded

Exhibit B
Put Fee

$$TF = \frac{[(RA - (\$500{,}000 \times Y)) \text{ or } (\$0), \text{ whichever is greater}] + (A)}{2} \times AP$$

Call Fee

$$[(RA - (\$500{,}000 \times Y) \text{ or } (A), \text{ whichever is greater}] \times AP$$

Where:

TF = Termination Fee

RA = Retention Amount

Y = Years of Operation of the Business

A = Appraised Value of the Business

AP = Applicable Percentage